No. 79-1144

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC., *Petitioner,*

v.

RADCLIFF MATERIALS, INC., ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

AND BRIEF *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

River Cement Company hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case, in support of respondents. The written consent of the attorney for the respondents has been obtained. The consent of the two attorneys for the petitioner was requested, but they have not yet responded to the request.

The interest of River Cement Company in this cause arises from the fact that it is a defendant in a multidistrict class action presently pending in the United States District Court for the District of Arizona in which the same issue is before the court; namely, whether a defendant in a federal antitrust case may seek contribution. *In re Cement and Concrete Anti-*

trust Litigation, No. CIV 76-488A-PHX CAM; MDL 296 (D. Ariz.).

In the instant case petitioner is seeking to assert a third-party claim for contribution against alleged co-conspirators which the plaintiff chose not to sue. The parties in their arguments below, and the Court of Appeals in its opinion, focused on the antitrust enforcement consequences of the fact that a private antitrust plaintiff need not sue all coconspirators but may choose to proceed against any one or more of them. The impact of a right to contribution on antitrust settlements and the resulting consequences for antitrust enforcement, was neither involved nor addressed below, and it is unlikely that it will be emphasized by the parties here.

River Cement Company has settled with the plaintiff classes in its case, but is now faced with a cross claim for contribution which its non-settling co-defendants seek to assert. The brief which *amicus curiae* is requesting permission to file contains an argument on the likely effect a right to contribution would have on settlements and their important role in antitrust enforcement. That argument likely will not otherwise be made, and it addresses an important policy issue which ought to be considered in reaching a decision here.

Respectfully submitted,

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BRIEF OF RIVER CEMENT COMPANY, *AMICUS CURIAE*

River Cement Company ("River") submits this brief *amicus curiae* to focus the Court's attention upon certain important policy considerations that are of particular concern to small and medium sized antitrust defendants. The narrow question before the Court is whether petitioner may assert a third-party claim for contribution against respondents in a price fixing action brought against petitioner alone. Because none of the alleged coconspirators have settled the price fixing claims, the question of how recognition of a right to contribution would impact antitrust settlements, and

the resulting consequences for antitrust enforcement might be left for a subsequent case. River urges, however, that the Court take into account the concerns of settling antitrust defendants, and the important policy considerations served by their settlements, in reaching its decision in this case.

INTEREST OF THE *AMICUS CURIAE*

River is one of several dozen defendants in a consolidated multi-district class action against the cement industry,[1] in which plaintiffs seek damages for defendants' alleged price fixing. River is engaged solely in the cement business; its share of the national cement market is relatively small (less than 2%); and it has never conducted business anywhere near Arizona.

River has denied liability throughout the 4½ year pendency of that proceeding, which is yet only in the initial discovery stage. However, as one of the smaller defendants, the expense of remaining enmeshed in protracted and complex litigation far from its operations proved excessively burdensome. Hence, River became the first defendant to settle, executing an agreement dated July 10, 1979, whereby plaintiffs relinquished all of their claims against River for a payment of $1.75 million.[2]

Although, as the Settlement Agreement expressly states, the parties believed that no right of contribu-

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[1] *In re Cement and Concrete Antitrust Litigation;* No. CIV 76-488A-PHX CAM; M.D.L. 296 (D. Ariz.).

[2] The settlement received preliminary approval from the court on October 20, 1980. The hearing on final approval will be held on February 3, 1981, in conjunction with the only other settlements (three) which have been reached.

tion exists among antitrust defendants, River sought to incorporate in the Agreement a measure of protection against contribution if a court should conclude otherwise. River first asked plaintiffs to delete River's sales from their claims against the non-settling defendants, but plaintiffs would not settle on that basis. However, plaintiffs did ultimately agree to reduce any final judgment they obtained against any other defendant by the amount of any judgment for contribution which such other defendant obtained against River. Quite plainly, such an agreement did not fully protect River against the risk of contribution. River remained vulnerable to a crossclaim or to a separate action for contribution brought by any or all of its (non-settling) co-defendants. Faced with the expense of further litigation, River chose to rely on the then-existing weight of authority denying contribution in antitrust cases and acceded to plaintiffs' terms. Possibly encouraged by this Court's decision to review the contribution question, the non-settling defendants have now moved to supplement their answers by asserting a crossclaim for contribution against River which, if allowed, would again saddle River with the expense of defending a case it agreed to settle eighteen months ago.

River's interest here is plainly substantial. Permitting a right of contribution to be asserted against a defendant who has already settled would destroy the very repose which River sought to achieve through settlement. At the same time, River is especially sensitive to the chilling effect recognition of a right to contribution is likely to have upon future settlements—particularly if non-settling defendants may press contribution claims against settling defendants, rather than being confined to seeking a reduction in the amount claimed

by settling plaintiffs.[3] River, on behalf of settling antitrust defendants, asks the Court to deny the right of contribution; or, at the very least, to qualify any right of contribution by holding it inapplicable against a party who settles in good faith, in order to minimize the impact of a right to contribution on the settlement of antitrust cases, and to avoid hampering private enforcement of the antitrust laws.

SUMMARY OF ARGUMENT

Recognition of a right to seek contribution against antitrust defendants which settle in good faith would virtually eliminate the settlement of antitrust claims; would seriously hamper the private enforcement of the antitrust laws; and would significantly impair the ability of the smaller companies in an industry to compete.

ARGUMENT

Because River has already settled, it would be inappropriate for us to dwell at length on the reasons that a rule of contribution—even if qualified by claim reduction—would severely impede the settlement process. River's concerns about contribution center on the inequitable retroactive impact on its settlement if contribution claims could be asserted against settling defendants. These concerns—and undoubtedly the concerns of numerous similarly situated settling defendants in other cases—would be removed if the Court fashioned a rule of claim reduction to take account of any settlements and barred the assertion of contribution claims against settling defendants.

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[3] "Claim reduction" refers to a reduction of plaintiff's total recoverable damages by an amount equal to that portion attributable to a settling defendant.

Nevertheless, we wish to point out that even adding the principle of claim reduction to a rule of contribution might not eliminate the chilling effect such a rule would have upon settlements. Senators Kennedy and Metzenbaum, commenting on S. 1468 (the contribution bill pending in Congress), offered the following cogent observation:

> The small defendant must be able to settle early in the litigation for an affordable amount. Mandatory claim reduction will discourage plaintiffs from settling with small and relatively financially weak companies early in the litigation. Small companies will be unable to escape potentially bankrupting liability and huge legal expenses as they do now through early settlement.
>
> Report of the Committee of the Judiciary, United States Senate, on S. 1468, together with Supplemental Views, S. Rep. No. 96-428, 96 Cong., 1st Sess. (1979), at 31.

Thus, even when qualified by claim reduction, a rule of contribution might in practice compel the small antitrust defendant, whose interest would best be served by early settlement, to proceed nevertheless with expensive and potentially destructive litigation. Permitting contribution against settling defendants without such a qualification, however, would virtually eliminate the settlement of antitrust claims. As the Third Circuit stated, in refusing to recognize a right to contribution against settling tortfeasors but adopting claim reduction in negligence cases:

> Voluntary settlements are to be encouraged and a rule permitting contribution under such circumstances would not work to that end. Not only would a joint tortfeasor defendant be stripped of any incentive to settle but he would have a positive in-

> centive to stand trial and actively participate in his defense in order to minimize his liability. *Gomes* v. *Brodhurst,* 394 F.2d 465, 468 (3rd Cir. 1967).

It is precisely such concerns which have led many states to adopt laws patterned after the Uniform Contribution Among Joint Tortfeasors Act, § 4, 12 U.L.A. 98 (1975), which provides:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury . . . . (b) [i]t discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.[4]

Such concerns also prompted Congressional advocates of antitrust contribution to deny contribution rights against settling defendants and to include claim reduction, in their proposed legislation.[5]

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[4] *See, e.g.,* Cal. Civ. Proc. Code § 877 (b) (West); N.Y. Gen. Oblig. Law § 15-108(b) (McKinney). The Uniform Act (§ 4(a)) and the California Statute credit a non-settling defendant with the amount of any settlements by co-tortfeasors. The New York Statute reduces the plaintiff's claim against non-settling defendants by the greater of the settlement amount or the settling defendants' equitable share of the plaintiffs damages.

[5] *See, e.g.,* the relevant portions of S. 1468:

> (b) A release or a covenant not to sue or not to enforce a judgment received in settlement by one of two or more persons subject to contribution under this section shall not discharge any other persons from liability unless its terms expressly so provide. The court shall reduce the claim of the person giving the release or covenant against other persons subject to liability by the greatest of: (1) any amount stipulated by the release or covenant, (2) the amount of consideration paid for it, or (3) treble the actual damages attributable to the settling person's sales or purchases of goods or services.

(*footnote continued on next page*)

Numerous briefs have already been submitted to this Court demonstrating that claim reduction is a necessary corollary to any rule of contribution, and that such an approach finds support in the case law, the commentaries and the halls of Congress. Indeed, even petitioners,[6] and most of the *amici* supporting them,[7] concede as much. As a small antitrust defendant, however, River wishes to add its voice to the chorus by emphasizing that unless the impact of the decision in this case upon the antitrust settlement process is considered, there is a risk that havoc may be wreaked upon that process. Much has been said by *amici* supporting petitioners about the coercive effects which a no contribution rule has on defendants who do not wish to settle. River's experience suggests, however, that the threat of contribution can be a device used by large corporate defendants to maximize their own bargaining position at the expense of smaller defendants—which do not have comparable resources to bear the burden of defending against a class action antitrust

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(*continued*)

> Under item (3) above, actual damages shall not be trebled in proceedings under section 4A of this Act.
>
> (c) A release or covenant, or an agreement which provides for a release or covenant, entered into in good faith, relieves the recipient from liability to any other person for contribution, with respect to the claim of the person giving the release or covenant, or agreement, unless the settlement provided for in any such release, covenant, or agreement is not consummated.

[6] *See* Brief of Texas Industries, Inc., at 26-27.

[7] *See* Brief of The Mead Corporation, at 7; Brief of Georgia-Pacific Corporation and Packaging Corporation of America, at 25-29; Brief of Olson Farms, Inc., at 16; Brief of Westvaco Corporation, at 11.

suit—by keeping them from breaking ranks and settling out early. Any right to antitrust contribution which is not at least qualified by a rule which exonerates settling defendants would effectively force smaller defendants against their will to continue to bear the heavy costs of antitrust litigation, and thereby impair their ability to compete—a result that the antitrust laws were expressly designed to avoid.

CONCLUSION

For the reasons stated, River submits that the Court should issue its decision in this case with an eye toward protecting and fostering the antitrust settlement process—by affirming the decision below or, at the very least, by making it clear that no right of contribution exists against defendants which settle in good faith.

Respectively submitted,

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